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NO. 88-2098

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

TOWNSHIP OF PARKS,
Petitioner,

v.

BABCOCK & WILCOX COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

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I. PARKS TOWNSHIP'S ALLEGATIONS OF LEGAL ERROR ARE UNCONTESTED BY BABCOCK & WILCOX

A District Court's Rule 41(a)(2) dismissal without prejudice commits reversible error unless it states "compelling" reasons therefor and, most particularly, unless it "adequately explain[s] its refusal ... [to compensate defendant]'s wasted attorneys' fees." Taragan v. Eli Lilly & Co., 638 F.2d 1327 (D.C. Cir. 1988) (remand for explanation of refusal to award attorneys' fees); McCants v. Ford Motor Co., 781 F.2d 855, 859-61 (same), enforced, 789 F.2d 1539 (11th Cir. 1986) (approving Rule 41(a)(2) fee award after remand); cf. Ferguson v. Eakle, 492 F.2d 26, 29 (3d Cir. 1974) ("draconian measure" of dismissal without prejudice reversed where no "compelling reason" therefor at late stage of pre-trial). The substantive issue presented

in this case is whether the three explanations offered by the District Court's opinion are adequate reasons to support its discretionary dismissal without prejudice and also without compensating the wasted litigation expenses of Parks Township ("Township").

"[D]iscretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975) (citation omitted). Explanations that rely solely on erroneous statements of legal principle cannot be adequate or sound. The Circuit Court's affirmance of the District Court's dismissal necessarily found its three explanations to be legally sound. Babcock & Wilcox v. Township of Parks, 866 F.2d 1408 (3d Cir. 1988) (table). By contrast, every other court

that has addressed the three legal propositions which constitute the District Court's explanation for denying the Township's expenses has rejected them.

1) No other court has dismissed on the basis of such unusual conditions as were ordered below, which give scant compensation for defendant's financial loss so long as the defendant's mostly wasted efforts are "not [entirely] in vain;" other courts customarily apply fee and discovery conditions that "cure any conceivable legal prejudice" to defendant, Respondent's Brief in Opposition ("Opp.") 16; Petition for Writ of Certiorari ("Pet.") 28.

2) No other court has ever denied Rule 41(a)(2) attorney's fees because plaintiff's bad faith was not proven; courts have expressly rejected any such concept. Pet. 19, 47-48.

3) No other court has found a defendant's litigation expenses not "wasted" on Rule 41(a)(2) dismissal because the work product resulting from those expenses, except taxable costs, might somehow be reused in some conceivable subsequent litigation not pending or contemplated at the time of dismissal; courts reduce a fee award only for the amount of work product specifically found reusable in pending or contemplated litigation. Pet. 19-20, 48-51.

Babcock & Wilcox ("B&W") does not directly contest these three allegations of error. Instead, it sidesteps these questions by alleging the first two "miss the point" and begging the last. 1/

1/ Rather than address the cases which limit the reusable work product rule to "pending" litigation, B&W begs the question by changing the rule to read "pending or likely," Opp. 16. No precedent or logic supports such an amendment of the rule, and the court

B&W describes these three explanations as "phrases of the Magistrate's Report [taken] out of context." Opp. 16, without showing how their context could lend them a different meaning. While insisting the court applied "well-settled principles" to this case, Opp. 9, B&W neither shows that the court offered any specific explanation for its judgment other than these three newly created rules, or that these rules were ever before applied by any court. 2/

(n.1) below did not in any event find subsequent litigation in this case "likely," let alone refuse fees for that reason. This tactic of inventing law, facts, and an application by the court of nonexistent law to nonexistent facts typifies B&W's approach to this case.

As to the first question, B&W uses the "big lie" technique, baldly asserting that the court's conditions were intended to "protect the Township from any legal harm," Opp. 13, 16, though the court neither did, nor claimed an intention to do, any such thing. Infra p. 17.

2/ B&W generalizes that an award of fees is not mandatory in all Rule 41(a)(2) cases, Opp. 14, without mentioning that

Since a mere reading of the court's opinion disproves B&W's main line of defense, i.e. that the court's opinion did not include the three explanations for dismissing without prejudice and without compensation of expenses that it patently did, this case frames a clear issue on a very simple record. Therefore B&W, as a second line of defense, seeks to rewrite the decision below, premised on a "factual" record of its own invention.

II. THOUGH B&W SEEKS TO MUDDY THE RECORD, THERE IS BROAD AGREEMENT ON THE DECISIVE FACTS IN THIS CASE

Not able to defend what the court below did hold, B&W invents two alternate

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(n.2) the cases it cites apply the only recognized reasons for denying fees, all of which are wholly inapplicable to this case: 1) where defendant's request is untimely, 2) where work product can be reused in a pending case, and 3) the rare occasion where, for special procedural reasons, dismissals with or without prejudice are essentially equivalent. A41-47, A51-54, R.1491.

"explanations" for the court's dismissal that appear nowhere in the text of its opinion: 1) that the Township's payment of "virtually no attorneys' fees," Opp. 14, justifies denial of fees actually paid (and which were quite substantial for this small Township, albeit "virtually nothing" from the perspective of B&W); and 2) that B&W's victory on one of the four basic contested discovery issues was reason to refuse an award of defendant's costs and fees, although the District Court denied sanctions requested by B&W on identical grounds, and B&W did not appeal. 3/

3/ R. 687, 976. B&W falsely claims to have "won virtually every substantive decision" in disputes over discovery, Opp. 5, 4 n.5: 1) B&W's subpoena duces tecum was quashed, and not a single document from the boxes of documents subject to the subpoena and objected to by the Township was compelled, R.683; 2) B&W also lost the main discovery issue, its attempt to compel the Township Supervisors to testify as to their legislative activities, R.216; and 3) a

There is no need to dwell on the half truths and outright distortions upon which B&W premises these arguments, because they furnish no remote ingredient of the actual explanations for the court's judgment, they are not supported by reference to facts in the extensive 1700 page record, nor are they reasons that any other court has employed to deny fees. 4/

(n.3) subpoena premised on B&W's false allegation that the Supervisor's testimony was inconsistent with previous testimony was quashed by the Court as "outrageous." R.1328, 1725. B&W's only discovery victory was an unprecedented ruling over a hotly disputed question of whether legislators can be forced, in their "administrative capacity," to testify on matters which relate to their motive for enacting legislation. Pet. 7. Thus inspection of the actual record shows B&W was restricted to "limited discovery efforts," Opp. 5 n.6, due to the fact that the court denied nearly all of the extensive and overreaching discovery B&W so aggressively pursued.

4/ B&W quotes probable dicta from Puerto Rico MSA v. Leith, 668 F.2d 46 (1st Cir. 1981) ("PRMSA"), Opp. 14 & n.13, an opaque decision in what was probably a

By its strategy of making provocative, but irrelevant assertions of fact dehors the record B&W attempts to deceive the Court into believing that this case requires "application of well settled principles to disputed facts," Opp. 9, so as to make it appear too fact-bound for review. The truth is the exact opposite:

(n.4) Rule 41(a)(1)(i), not (a)(2), case. The Circuit Court upheld the denial of fees where: 1) work product could be reused in pending litigation, and 2) dismissal without prejudice was equivalent to granting a pending defense motion on federal jurisdiction. The court also approved, in the quoted passage, the trial court's denial of costs for allegations of improper behavior, for which both parties had made "frequent applications" to the court, PRMSA at 48 & n.5, and therefore denied payment of offsetting discovery sanctions as a condition for dismissal. Unlike in PRMSA, all of B&W's sanctions motions have already been denied by the court. Only the Township's three sanctions motions were still pending upon dismissal, notwithstanding B&W's attempt to reconstruct the record to include imaginary orders "effectively denying" them, Opp. 22. Unlike PRMSA, a payment of sanctions condition is appropriate here.

the only substantial and relevant factual dispute arising from the record is whether three stated legal principles were indeed the court's explanation for its dismissal. B&W's effort to disguise this pure issue of law behind a cloud of controversy over red herring and strawman arguments, and allegations not supported by the record, 5/ is best countered with a summary of the relevant facts and arguments that B&W does not contest:

1) that B&W sued the Township for millions of dollars, based on claims that it had a constitutional "right to operate its property" in a manner as to emit

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5/ It was necessary to submit a separate brief to the Court of Appeals to address similar false statements and distortions, many of which are repeated here but cannot be replied to in the space permitted. R.1710. One such deception is B&W's projection onto the Township of "incorrect statements of law and false factual allegations," Opp. 8, without pointing to any single miscited case or unsupported factual statement.

materials defined by the EPA as "hazardous air pollutants" in violation of the Township's Ordinance, and it cites no case where such an argument has ever been made, let alone succeeded. Pet. 4, Opp. 3 n.4;

2) that after 30 months' litigation, long after the court ordered close of discovery, and after two hearings on the Township's Motion for Summary Judgment were cancelled at B&W's request, this case was voluntarily dismissed, Pet. 8;

3) that B&W spent an "enormous sum" suing the Township, while, upon B&W's voluntary dismissal without prejudice, the Township was left uncompensated for $300,000 worth of litigation costs, including about $33,000 out of pocket costs. Opp. 14-15, Pet. 8, 51. 6/

6/ B&W seeks to introduce the red herring issue of whether the Township can be "awarded attorney's fees that it never paid," Opp. 15, distinguishing the

4) that B&W suggested all of the unusual and unprecedented conditions for dismissal imposed by the court, except the payment of taxable costs which is required by law, Pet. 14;

5) that the Commonwealth of Pennsylvania described B&W's reason for dismissal as no more than "blue smoke and mirrors," Pet. 28, but this evidence of bad faith was ignored by the court;

6) that no court below addressed any

(n.6) value of Township resources raised from tax revenues and those raised by donation. But the issue properly before the court is whether the Township is entitled to a fair hearing and an adequate explanation before fees may be denied under Rule 41; the question of the proper measure for assessing those fees is not presented here. No court below, or elsewhere, has relied on B&W's novel argument that where a local government's lawyer is paid a below-market fee, the plaintiff should be permitted the windfall of dismissing its lawsuit without reimbursing either the market value of the litigation costs wasted in defending the suit or the actual amount paid to the government's lawyer.

single one of the Township's arguments that a dismissal without prejudice should be denied, or at least conditioned upon the customary award of attorney's fees and certain discovery provisions: 7/

7) that no Article III judge gave a reasoned decision in this case, or any response to the Township's briefing on the ten significant unprecedented rulings below, Pet. 26-32.

Given this broad agreement on the basic facts necessary to determine the issues before the court, the main areas of disagreement are easily identified. They

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7/ B&W recasts the Township's argument into a contention that the courts below should have addressed "each" and "every one," Opp. 18, 20-21, of the arguments made by the Township. Of course there is a wide difference between such a strawman contention, and the Township's actual contention that the courts "totally ignored all defendant's contrary precedent and argument" in opposition to voluntary dismissal terms favorable to the plaintiff. Pet. ii, 8-9, 23, 24.

primarily involve this court's criteria for granting certiorari: 1) whether the summary affirmance of the District Court's decision by the Circuit creates a conflict with other Circuits, and 2) whether this is an important case. Opp. 10-17, 24-26.

III. THE COURT OF APPEALS' SUMMARY AFFIRMANCE OF A RULE 41(a)(2) DISMISSAL IS A HOLDING THAT CONFLICTS WITH THOSE OF OTHER CIRCUITS

B&W cites the well known principle that, on summary affirmance, the result below but not the opinion is adopted by the reviewing court. Though the Third Circuit has not addressed this issue at any length, its approach would not be far different from that of this Court.

In Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 180-181 (1978) this court noted "that summary affirmances have considerably less precedential value than an opinion on the

merits," involving only what "was essential to sustain that judgment." id. 183 (citations omitted). A summary affirmance addresses only "the precise issues presented and necessarily decided by those actions." (citation omitted) id. 182; see also Washington v. Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979).

Applying these accepted rules to this case, it is clear that what little reasoning there is behind the District Court's explanations for its denial of fees may not be deemed adopted by the Court of Appeals. But the explanations themselves were "necessarily decided" and approved by the summary affirmance, which therefore constitutes a Third Circuit holding on their adequacy. Supra pp.1-3.

B&W attempts to obscure this distinction by misquoting a case which said "[i]t is misleading to refer to the

language of the district court as a 'Third Circuit holding'" when citing a summary affirmance. Taylor v. Diznoff, 633 F.Supp. 640, 642 (W.D. Pa. 1986) (emphasis added). B&W's deceptive substitution of "decision" for the word "language" converts this quote to its opposite meaning. Opp. 12. It is precisely the difference between the mere "language" of the opinion below and the three elements of the decision offered to support it which is decisive here. B&W's argument that the summary affirmance lacks any holding of legal principle which might conflict with holdings of other Circuits is thus clearly wrong. See Ivan Allen Co. v. U.S., 422 U.S. 617, 623 (1975) (granting certiorari where a conflict appears from a summarily affirmed District Court decision). Cf. e.g. Davis v. Scherer, 468 U.S. 183, 189 (1984).

IV. DISTRICT COURT APPLIED NOVEL "NOT IN VAIN" RULE RATHER THAN THE CUSTOMARY RULE PROTECTING DEFENDANT FROM "ANY PREJUDICE"

Rather than defend the court's "not in vain" rule, B&W claims that the Court did apply the "cure any prejudice" rule in setting dismissal conditions, Opp. 16. But the court's opinion makes no mention of the latter rule. Though the court does make ambiguous mention of preventing "inequity" to defendant, it immediately qualifies even this equivocal proposition with its two erroneous reasons for denying fees. A10-11 ("However ...").

B&W contends nevertheless that the conditions did "cure any prejudice" because the Township received what B&W contends it desired, Opp. 13 & n.12, a proposition having no support in the record. R.223, 1309-22, 1718-20. B&W further supports this argument with deliberate miscitations for the false

proposition that the burden of proving legal prejudice shifts to the defendant who opposes dismissal without prejudice, Opp. 13 n.11, rather than remaining with the proponent of the motion. R. 1462-63.

The court's conditions ignored every one of the Township's suggestions, A107-13, and were cleverly drafted solely by B&W itself for the very purpose of appearing to give something, while giving up virtually nothing at all of value, much less anything resembling conditions set by any other court. Prohibiting "B&W from ever operating the VRSF's incinerator in Parks Township," Opp. 13, is useless when B&W had already abandoned this particular incinerator, necessary licenses were unavailable for it, and B&W can raise the same insubstantial issues again in support of some non-"VRSF" type project which would emit as much pollution in violation

of the Ordinance as would the "VRSF" mentioned in the court's order. A107.

An order directing "that B&W comply with all of the Ordinance's emission standards," id., but provides no particular remedy, is also useless where the Ordinance itself requires compliance and provides for enforcement, A108.

V. THE PERNICIOUS EFFECT OF THIS CASE ON LOCAL DEMOCRACY WILL NOT BE EASILY REMEDIED UNLESS THE COURT REVERSES

Finally, B&W's attempt to demean the significance of the principles involved here, and counsel's motives, by characterizing this case as merely an attempt to obtain fees, Opp. 1, is both wrong in fact, see Question III(1), Pet. ii-iii, and has been eloquently answered in amici's statement concerning the serious widespread impact this decision will have on local self-government. The mere existence of this unreversed decision

will deter local governments from even attempting to defend such suits by powerful corporations like B&W.

This court will not soon see another case -- and certainly not one with facts so sharply defined -- in which to remedy the problem. Local governments and attorneys will not defend such cases at the risk that another court might follow this case and leave the expenditure of scarce resources completely wasted. Rule 11 is no remedy for this abuse, where insubstantial claims are voluntarily dismissed before a court adresses their merits, and a Rule 11 motion may be held moot in order to "move the docket." The remedy designed to meet this evil, Rule 41(a)(2), should be preserved.

Respectfully submitted,

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